SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

December Term, 1971

No. 71-734

JULIO RIVERA,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, JULIO RIVERA, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming judgment of the United States District Court for the Southern District of New York.

OPINION BELOW

There was no opinion in the District Court, and the Court of Appeals affirmed the judgment of the District Court without opinion.

JURISDICTION

The date of the judgment sought to be reviewed is October 7, 1971. It was entertained the same date.

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, §1254, United States Code.

STATEMENT

Petitioner was tried by jury and found guilty on June 4, 1971 of violation of Title 18 U.S.C. §2 (Aiding and Abetting) and Title 26 U.S.C. 4705(a).

The Court imposed the mandatory five (5) year minimum term. The conviction was affirmed by the United States Court of Appeals for the Second Circuit on

October 7, 1971.

GOVERNMENT'S CASE

Peter Wilcocki, an Agent with the Bureau of Narcotics and fellow Agent Pitts were in the vicinity of 12th Street and Greenwich Avenue, New York City, at about 1:30 P.M., and were watching two other Agents, Mosker and Nargi. They saw a man join Agent Nargi and together the three men entered an auto and drove to the Maritime Union where the man left the auto and returned shortly with another man and both then entered the auto occupied by Agents Mosker and Nargi.

Agent Wilcocki identified Rivera as the first man he saw and co-defendant Caraballo as the second one.

On June 17, 1969, he observed only Caraballo enter the auto occupied by the agents — not Rivera.

On cross-examination he stated that this was his only contact with Rivera and never saw him again until after Rivera's arrest.

Agent Nargi stated that on January 16, 1969, he and Agent Mosker met Rivera pursuant to a prior telephone conversation and that Rovera told him that he would introduce him to someone as they drove to the Maritime Union Hall. Rivera left the auto and returned with Caraballo. The Agents drove back to Greenwich Avenue and 12th Street and dropped Rivera off and there was no further contact with Rivera.

On cross-examination Agent Nargi stated there was no conversation relating to the sale of narcotics in the presence of both Rivera and Caraballo during the auto ride.

Casimiro Liotta, a chemist, stated that he examined the substance from

Caraballo and found that it contained 29 grams of cocaine and mannitol.

RIVERA'S DEFENSE

Julio Rivera testified in his own behalf, having recourse to an interpreter. He stated that he never sold cocaine to anyone and never know that Caraballo ever sold any to Agent Nargi.

That he knew Agent Nargi as Denny and on one occasion the agent asked him if he would care to make a connection for him. Rivera told him that he would introduce him to Caraballo who might be able to help him. After introducing Caraballo to the agents he left them.

After this final meeting Rivera did not see the agents again although they telephoned him many times at home. His response to their calls was that he didn't want to be bothered by them and was arrested shortly after his final

refusal to speak with Agent Nargi.

On cross-examination Rivera was asked various questions, e.g., were there many people around the Union Hall at the time of the original introduction? Did he meet Agent Nargi in December 1968? Rivera denied doing so; and he also denied calling Caraballo prior to the initial introduction.

Agent Nargi, on rebuttal, stated that Rivera told him that he would introduce Nargi to a person who sells cocaine. That later on he met Rivera with "Mario" and they all entered an auto where "Mario" offered to sell an ounce of cocaine for $600.

ARGUMENT

This Court should grant the petition for a writ of certiorari for the following reason:

The ruling of the Trial Court re-

garding testimony of subsequent criminal act was erroneous.

POINT ONE

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT APPELLANT RIVERA AIDED AND ABETTED BEYOND A REASONABLE DOUBT.

It should be considered that your petitioner does not have a criminal record with the possible exception of having once illegally worn a navy uniform in Puerto Rico in 1940.

Petitioner is forty-eight years of age, married for twenty-five years and the father of four children. He is a merchant seaman and was recently injured while so employed.

An important factor in evaluating Rivera's trial testimony was the unfortunate situation involving one of the Spanish interpretors. The first interpretor was compelled to be relieved in

the middle of Rivera's testimony because of her inability to adequately translate into English Rivera's words and thoughts. Another interpretor was used with better results.

It is virtually undisputed by either side that Rivera's sole involvement in the entire transaction was that he introduced the Narcotic Agents to co-defendant Caraballo. Rivera was not present during any conversation occurring between Caraballo and the agents relating to the sale of drugs. Furthermore, he was not present during the alleged sale of narcotics. Rivera received no money and thus did not profit from any alleged sale of drugs.

The question involved here is whether or not a person who introduced another person to a Narcotic Agent for the possible sale of narcotics is guilty in aiding and abetting if he had no

knowledge if the purchase occurred and had no further dealings after the introduction. United States v. Moses, 220 F.2d 166, appears to be directly in point.

In United States v. Moses, supra, appellant was a drug addict (not so in this case) and acted at the behest of buyers (as did Rivera). There is no other showing of association (as in the instant case).

In Moses, supra, the Court stated in part, reversing the conviction, that in order to aid and abet another to commit a crime it is necessary that defendant must in some manner participate in bringing it about and that his actions make it succeed. (Nye and Neisson v. United States, 336 U.S. 613, 69 S.Ct. 766, 769; United States v. Peoni, 100 F.2d 401, 402 (2nd Cir.).

In the instant case, petitioner associated himself only to the extent of introducing his co-defendant to the Narcotic Agents — at their request — and co-defendant may have been a possible seller of narcotics. It is felt that this conduct of Rivera, standing alone as it does, is insufficient. Clark v. United States, 293 F.2d 445.

POINT TWO

IT WAS IMPROPER TO INTRODUCE EVIDENCE OF ANOTHER INCOMPLETED, SIMILAR SUBSEQUENT TRANSACTION THUS DEPRIVING PETITIONER OF A FAIR TRIAL.

In rebuttal to testimony of your petitioner, Agent Nargi testified that a week after the crime alleged in the indictment, Rivera called him and offered to introduce him to a person who could sell him cocaine. Later, a meeting occurred with Agent Nargi, Rivera and a third person who said he

could sell cocaine for $600 an ounce. Over objection the Court below permitted this evidence to be admitted, limited to the issue of whether Rivera intentionally aided and abetted his co-defendant, Caraballo.

This evidence was highly prejudicial to Rivera in spite of the Court's limitation on its admissibility. The harmful inferences arising from that testimony were damaging to petitioner.

The commission of prior similar crimes may be admissible to show intent where the probative value of evidence outweighs its prejudicial character. United States v. Deaton, 381 F.2d 114; United States v. Johnson, 382 F.2d 281.

Where the probative value is slight and prejudice great, the Court should exclude the evidence, United States v. Knohl, 379 F.2d 427.

The testimony should have been rejected inasmuch as it did not concern a completed crime but only a possible cocaine sale. There was no evidence that the criminal transaction occurred. See, United States v. Adams, 385 F.2d 548, 551.

Agent Nargi's testimony should have been rejected since it concerned an event which occurred subsequent to the crime charged in the indictment. It is distinguishable from most cases on this point which involve similar prior acts of misconduct which are admitted to prove subsequent intent. It is less reliable to infer a person's prior intent from a future act than it would be to infer a present intent from a prior act. Although United States v. Cuadrado, 413 F.2d 633, allowed evidence of a subsequent sale, there it was a completed sale and went to rebut

a defense of alibi. It is clearly distinguishable from the case at bar. The reasons for rejecting the testimony far outweigh its limited probative value to petitioner's intent at a prior time. The Court's limiting instruction in no way removed the obvious prejudice to petitioner.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

ALBERT J. BRACKLEY
Attorney for Petitioner

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-734

JULIO RIVERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial with one Caraballo in the United States District Court for the Southern District of New York, petitioner was convicted of having aided and abetted the transfer by Caraballo of a quantity of cocaine hydrochloride not pursuant to a written order form, in violation of 26 U.S.C. 4705(a) and 18 U.S.C. 2.[1] On June 4, 1971, petitioner was sentenced to imprisonment for the mandatory minimum of five years. The court of appeals affirmed the conviction on October 7, 1971, without opinion. The petition for a writ of certiorari was not filed until November 30, 1971, and is out of time under Rule 22(2) of the Rules of this Court. In any event, the petition raises no issue warranting review.

[1] Caraballo was convicted of two substantive violations.

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On December 3, 1968, undercover agent Nargi was introduced to petitioner by a confidential informant of the Bureau of Narcotics and Dangerous Drugs (Tr. 169–170).[2] Nargi met with petitioner on at least three occasions between December 1968 and January 15, 1969. Each time the conversation related to the possibility of petitioner's introducing Nargi to someone who would sell Nargi cocaine (Tr. 182–186).

By prearrangement, on January 16, 1969, at about 1:15 p.m., Nargi met with petitioner at Greenwich Avenue and 12th Street in Manhattan. Petitioner promised to introduce Nargi to a seaman named "Ray" who would be able to sell him cocaine (Tr. 121–122, 182). At petitioner's direction, Nargi, another undercover agent, and petitioner drove to the National Maritime Union Hall on 13th Street where they parked. Stating that he was going to get "Ray" to introduce him to Nargi for the purpose of purchasing cocaine, petitioner entered the union hall alone (Tr. 122–123). A few minutes later petitioner returned to the car with co-defendant Caraballo; petitioner introduced him to the agents as "Ray" (Tr. 123). Both Caraballo and petitioner entered the agents' car, but petitioner left before any conversation about the sale of drugs took place (Tr. 188–189). Caraballo directed the agents to drive to "Little" West 12th Street; en route he told Nargi that he expected to receive a shipment of one kilo of cocaine which he could sell to Nargi for $20,000. Nargi

[2] "Tr." refers to the transcript of the trial testimony, a copy of which we are lodging with the Clerk of this Court.

stated that the price was high. The agent, however, agreed to purchase one ounce of cocaine on a future date (Tr. 124, 125, 130). As a sample, Caraballo then transferred to Nargi, without a written order form, a small white paper containing a white substance subsequently identified as 0.26 gram of cocaine hydrochloride (Tr. 125, 131, 133–135, 143; Gov. Exs. 2A, 2B, 4A). This constituted the basis for the convictions of petitioner and Caraballo under Count 1.[3]

Petitioner testified that he had met Nargi on the same day he introduced Nargi to Caraballo; that he had introduced the two men because Nargi wanted a connection for "something" which he never specified; and because Caraballo was standing nearby at the time (Tr. 307–308). Petitioner also denied knowing a person named Mario Ayuso and claimed that he had not met with Nargi and Mario on January 24, 1969 (Tr. 315–318).

In rebuttal, Nargi testified that on January 24, 1969, subsequent to the Caraballo introduction and sale, petitioner telephoned him to arrange a meeting with someone else who could sell cocaine. On that date, Nargi, petitioner, and a person called "Mario" met at 14th Street between 7th and 8th Avenues. In petitioner's presence, Mario offered to sell Nargi $600 worth of cocaine (Tr. 357–359). Upon defense objection to this conversation, the court instructed the jury as follows (Tr. 358–359):

> * * * I should tell you at this time, this is only being received as an alleged similar act of con-

[3] Caraballo was also convicted on Count 2, for selling cocaine to Nargi on the next day, January 17, 1969 (Tr. 126–130, 145).

> duct to be considered as to whether or not the defendant Rivera purposely, intentionally and deliberately facilitated or aided in the furtherance of the transaction as an aider and abettor by the introduction of Caraballo to the agent.

In its final charge, the court also repeated the substance of that instruction.

1. There is no merit to petitioner's contention that the evidence was insufficient to support his conviction as an aider and abettor (Pet. 6–9). In *Moses* v. *United States*, 220 F. 2d 166 (C.A. 3), relied on by petitioner (Pet. 8), the defendant who was a drug addict had waited at her apartment for the expected arrival of her narcotics supplier to whom she introduced the undercover agents after vouching for them. Finding that the defendant had no particular interest in whether or not a narcotics sale would be made, the court reversed the conviction for aiding and abetting. Here, on the other hand, petitioner, a non-addict, took an active part in the venture by speaking with agent Nargi on at least three occasions about introducing him to someone who would sell Nargi cocaine. Petitioner rode in the car with the agents to the Maritime Union Hall so that he could make the clandestine introduction to the actual narcotics seller, Caraballo. In light of his conduct, the jury could reasonably infer that petitioner knew Caraballo would transfer cocaine. Since petitioner had associated himself with the venture and sought by his actions to make it succeed, he was properly found guilty as an aider and abettor. *Nye & Nissen* v. *United States*, 336 U.S. 613, 619.

2. Petitioner contends that the trial court erred

in permitting agent Nargi to testify over defense objection that, subsequent to the sale charged in the indictment, petitioner introduced him to Mario who said he could sell Nargi cocaine for $600 an ounce (see Pet. 9–12). However, evidence of similar acts, including other crimes, either prior or subsequent to the crime charged in the indictment, is admissible when relevant for a particular purpose other than to show the accused's criminal character and where the probative value of the evidence outweighs its potential prejudicial effect. *United States* v. *Cuadrado*, 413 F. 2d 633, 635 (C.A. 2); *United States* v. *Deaton*, 381 F. 2d 114, 117–118 (C.A. 2); *United States* v. *Johnson*, 382, F. 2d 280, 2881 (C.A. 2). The evidence in this case which was inconsistent with petitioner's direct testimony and came in on rebuttal fell within this category. It was properly limited by the court's instruction as bearing upon petitioner's intent as an aider and abettor in introducing Caraballo to the agent (Tr. 358–359).[4] It is of no significance in the present context that there was no showing that a later cocaine sale was actually completed, since the evidence showed petitioner's criminal intent in attempting to arrange such a sale.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1972.

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[4] *United States* v. *Adams*, 385 F. 2d 548, 551 (C.A. 2), upon which petitioner relies (Pet. 11), recognizes that evidence of a planned but unconsummated narcotics sale is admissible, particularly in rebuttal, as showing an "accused's state of mind."

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